84-593 (1)

Office Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1984

TRAVIS N. BEESON
PETITIONER

VS.

HENRY E. HUDSON, ETC., ET AL
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In the trial before the District Court, where the issue of the voluntariness of Petitioner's resignation from employment with the Veterans Administration was litigated was Petitioner entitled to a trial by jury after making timely demand?

2. Was Petitioner's resignation from a position of employment with the Veterans Administration rendered involuntary by virtue of the fact that the Respondents, Petitioner's superiors, after they determined that Petitioner should be removed from his position, failed to follow the procedures mandated by 5 C.F.R. § 315.804 and 315.805?

3. Did Respondents, officials with the Veterans Administration, have the authority to seek Petitioner's resignation from employment with the Veterans Administration

without first following the procedures mandated by 5 C.F.R. § 315.804 and 315.805?

4. Was Petitioner's access to administrative remedies blocked or interfered with by Respondent where Respondents in seeking Petitioner's termination or resignation from the Veterans Administration failed to follow the procedures mandated by 5 C.F.R. § 315.804, 315.805 and 315.806 and where Petitioner's position of employment was abolished within three days after his resignation?

5. Did Petitioner, a probationary civil service employee with the Veterans Administration have a property interest in his continued employment to the extent of the procedures set forth in 5 C.F.R. § 315.804 and 315.805?

6. Where Respondents, officials with the Veterans Administration, failed to follow the procedures mandated by 5 C.F.R.

§ 315.804 and 315.805 with respect to decisions to terminate probationary civil service employees, are they entitled to immunity?

7. Do voluminous Federal Bureau of Investigation investigative reports with respect to Petitioner and other out of court statements admitted into evidence constitute inadmissible hearsay?

PARTIES

The parties to this proceeding are:

Travis N. Beeson, Petitioner

Henry E. Hudson, Individually and as the former Director, Veterans Administration Regional Office, Little Rock, Arkansas; Rufus Wilson, Individually and as former Chief of the Department of Veterans Benefits, Washington, D.C.; Donald Johnson, Individually and as the former Administrator, Veterans Administration, Nationally, Washington, D.C.; Fred B. Rhodes, Individually and as the former Deputy Administrator, Veterans Administration, Central Office, Washington, D.C., Respondents

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i

LIST OF PARTIES 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES. 3

REPORTS OF OPINIONS BELOW 5

JURSIDICTIONAL STATEMENT. 6

CONSTITUTIONAL PROVISIONS,
STATUTES AND REGULATIONS. 7

STATEMENT OF CASE 8

ARGUMENT. 11

APPENDIX. . . . . .

(i) Opinion and Order from
Court Below. A-1

(ii) Other Opinions. A-8

(iii) Constitutional Provisions,
Statutes & Regulations Involved. .A-63

CERTIFICATE OF SERVICE. A-71

TABLE OF AUTHORITIES

Cases

1. Beeson v. Hudson, 630 F.2d 622 (8th Cir. 1980). 9,14,24

2. Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980). 15

3. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). . . .25

4. Bullock v. Munford, 509 F.2d 384 (D.C.Cir. 1974). 18

5. Chagnon v. Bell, 642 F.2d 1248 (C.D.C. Cir. 1980) 17,22,29

6. Christie v. U.S., 518 F.2d 584 (Ct.Cl. 1975). 16

7. Cooper v. U.S., 639 F.2d 727 (Ct.Cl. 1980). 32

8. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727. 29

9. Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977) 18

10. O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980). . . .27

11. Pearlman v. U.S., 490 F.2d 928 (Ct.Cl. 1974). 15

12. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). 26

13. Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152 (1957). 17,20,28

Statutes and Constitutions

28 U.S.C.A. § 1291 10

28 U.S.C.A. § 1331(a), 1343. 8

Fifth Amendment to Constitution of U.S. 9

Seventh Amendment to Constitution of U.S. 15

Article Three of the Constitution of U.S. 8

Regulations

5 C.F.R. sec. 315.801-805. . . . . .11,18,19, 20,23,27,28

Rules

F.R.C.P. 38. 15

Fed. Rules of Evidence 801(c), 802 . .30,31,32

REPORT OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is not yet reported.

The opinion of the United States District Court for the Western District of Arkansas is not reported.

JURSIDICTION OF THIS COURT

The judgment to be reviewed in the United States Court of Appeals for the Eighth Circuit was dated and entered on July 12, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. sec. 1254.

CONSTITUTIONAL PROVISIONS. STATUTES AND REGULATIONS INVOLVED

28 U.S.C.A. § 1291

28 U.S.C.A. § 1331(a)

Amendment Seven to the Constitution of the United States of America

Amendment Five to the Constitution of the United States of America

Article Three of the Constitution of the United States of America

5 C.F.R. § 315.301

5 C.F.R. § 315.302

5 C.F.R. § 801-806

STATEMENT OF CASE

This civil action was filed by Petitioner, Travis N. Beeson, on January 29, 1976, against Respondents Henry Hudson, former manager of the Veterans Administration Regional Office in Little Rock, Arkansas, Petitioner's former immediate superior; Rufus H. Wilson, Chief Benefits Director, Department of Veterans Benefits, Veterans Administration, Hudson's superior; Fred Rhodes, Deputy Administrator, Veterans Administration, Wilson's superior; and Donald Johnson, former Administrator of Veterans Affairs.

Jurisdiction of the District Court was invoked pursuant to Article 3, Section 2, Clause 1 of the Constitution of the United States of America and 28 U.S.C. sec. 1331(a) and 1343.

Petitioner alleges entitlement to

compensatory and punitive damages from Respondents based upon a denial of due process in the divesting of a property interest possessed by him in his continued employment, by virtue of the Fifth Amendment to the Constitution of the United States of America, such property interest conferred by applicable federal civil service statutory and regulatory provisions.

By judgment filed November 2, 1979, the District Court granted summary judgment to Respondents. By decision dated September 17, 1980, The United States Court of Appeals for the Eighth Circuit reversed and remanded this cause for further proceedings. Beeson v. Hudson, 630 F.2d 622 (8th Cir. 1980)

Trial was held to the District Court without a jury over Petitioner's demand for jury trial on September 22-23, 1982 and subsequently on June 30, 1983, the District

Court entered its order dismissing Petitioner's complaint.

Appeal was made by Petitioner to the United States Court of Appeals for the Eighth Circuit under 28 U.S.C.A. § 1291. The Court of Appeals affirmed the District Court by per curiam order entered on July 12, 1984.

On August 4, 1969, Petitioner, Travis N. Beeson, accepted a career conditional appointment as staff assistant to the Regional Director of the Veterans Administration, Regional Office, Little Rock, Arkansas. The appointment was to a classification of GS-13, Step One; with a salary of $15,812.00 annually. The appointment was at the direction of the Central Office of the Veterans Administration, Washington, D.C. The first year of service was a probationary period.

The manager of the Veterans

Administration, Regional Office at Little Rock was the Respondent Henry Hudson. Hudson's superior was Respondent Wilson, Wilson's superior was Respondent Rhodes and Rhodes reported to Respondent Johnson.

In late 1969 and early 1970, Respondents Hudson, Wilson, Rhodes and Johnson became privy to certain reports of the Federal Bureau of Investigation covering investigation of Beeson of periods prior to and after August 4, 1969.

Based in part at least upon these reports, Respondents Wilson, Rhodes and Johnson finally decided on the morning of January 29, 1970, that Petitioner should be terminated.

There was in force 5 C.F.R. 375.805 which provides that when an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions

arising before his appointment, the employee is entitled to advance written notice stating, in detail, the reasons for the proposed action; a reasonable time for filing a written answer and for furnishing supporting affidavits; and written notice of the agency's decision informing him of his appeal rights.

These procedures were not followed with respect to Petitioner.

Instead, Respondent Wilson telephoned Respondent Hudson and directed him to call Petitioner into his office immediately and advise him that his position as staff assistant was being abolished and that he must resign. Respondent Hudson carried out these instructions at approximately 10:00 a.m., January 29, 1970. Petitioner requested the opportunity to investigate transfer to another agency of government but the request was refused by Hudson.

his accrued hours of annual leave.

In the early afternoon of that same day Respondent Wilson, having been advised by Respondent Hudson that Beeson had not resigned, telephoned Respondent again seeking his resignation. Respondent Wilson required a written resignation by 4:00 p.m. that same day, January 29, 1970.

After talking to an acquaintance employed at the White House, Mr. Nile Jackson, Petitioner telephoned Respondent Wilson and advised that his resignation would be forthcoming and he submitted the same the next morning.

Three days later the position formerly occupied by Petitioner was abolished.

ARGUMENT

1. By denying Petitioner a trial by jury the courts below have departed so widely from the usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

In Beeson v. Hudson, 630 F.2d 622 8th Cir. (1980) the United States Court of Appeals for the Eighth Circuit vacated the judgment of the United States District Court for the Western District of Arkansas in dismissing Petitioner's complaint against Respondents and remanded the case to the District Court for a determination of two questions: (1) Whether Petitioner voluntarily resigned or was constructively discharged and if he was constructively discharged (2) Whether his access to his administrative remedies was blocked or interfered with by Respondents in such a way

as to permit this action under the rule of Bishop v. Tice, 622 F.2d 349 (1980).

Despite the fact that Petitioner had made a demand for jury trial the District Court determined that a jury trial should be denied.

By virtue of the Seventh Amendment to the Constitution of the United States, Petitioner as is all other litigants in a civil action such as this seeking money judgment was entitled to trial by jury. This right is re-enforced and preserved under F.R.C.P. 38.

It is a basic proposition that in determining whether a resignation is voluntary the factors operating upon the employee's decision making process must be examined and where those factors make a voluntary decision impossible, a finding of involuntary resignation must be made. Pearlman v. U.S., 490 F.2d 928 (Ct.Cl.

1974); Christie v. U.S., 518 F.2d 584, 587 (Ct.Cl. 1975)

In the case at bar voluminous evidence was received with respect to the circumstances preceding and surrounding the submission of petitioner's resignation. Certainly, the determination of whether petitioner's resignation was voluntary encompassed factual determinations which petitioner was entitled to have presented to a jury of his peers.

The right to trial by jury is such a basic and fundamental right guaranteed by our Constitution that this petition for writ of certiorari should be granted to review the denial of the same.

2. The District Court, in its memorandum opinion which was endorsed by the Court of Appeals, found that a decision was reached by Respondents Johnson, Rhodes and

Wilson that Petitioner Beeson should be terminated before his "career conditional" appointment had run and that Respondents Wilson, in consultation with Respondents Johnson, Administrator of the Veterans Administration and Respondent Rhodes, Deputy Administrator, brought about Petitioner's letter of resignation.

These findings are important in that 5 C.F.R. 315.805 sets forth the applicable procedure to be followed when an agency proposes to terminate an employee serving a probationary or a trial period for reasons based in whole or in part on conditions arising before his appointment. Regulations establishing termination procedures are binding on those operating under them. Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152 (1957). Respondents were charged with knowledge of the applicable law. Chagnon v. Bell, 642 F.2d 1248

(D.C.Cir. 1980) See also Mazaleski v. Treusdell, 562 F.2d 701 (D.C.Cir. 1977). Also in point is Bullock v. Munford, 509 F.2d 384, (D.C.Cir. 1974) in which it was held that the failure to follow regulations adopted by an agency with respect to grievances, appeals, disciplinary actions and separations makes such separation unlawful.

Under 5 C.F.R. § 315.805 with respect to termination of probationers for reasons based in whole or in part on conditions arising before appointment it is provided that an employee is "entitled" to certain considerations including advance written notice and an opportunity to reply. The record in this case would show that Petitioner's resignation was sought at least in part based upon conditions existing before his appointment.

5 C.F.R. § 315.804, which covers terminations because of unsatisfactory work performance during the probationary period, provides that:

> When an agency decides to terminate an employee ...it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action.

In the case at hand Respondents proposed and decided that Petitioner should be terminated from his position of employment yet they admittedly failed to follow the mandatory provisions of 5 C.F.R. § 315.804-806 and instead directly approached Petitioner seeking his resignation.

Accordingly, the significant issue is presented as to whether or not Petitioner's resignation under any circumstance could be considered voluntary where his superiors failed to follow express provisions of applicable regulations as to the procedure

to be followed once a decision was made to terminate Petitioner.

This issue has never before been addressed by this Court and constitutes an important question of Constitutional law.

3. Similarly, this petition should be granted in order to examine the issue of whether Respondents, Veterans Administration officials, had the authority under applicable law to directly approach Petitioner, one of their subordinates, a probationary civil service employee, and in any way seek or request his resignation without first following the provisions of applicable law as set forth above. 5 C.F.R. 315.804, 805 and 806.

As stated above similar provisions have been held binding on those operating under them. Service v. Dulles, 354 U.S. 363 77 S.Ct. 1152 (1957). These regulations do

not provide that the probationary employee's supervisors may make the decision to terminate or may propose to terminate the employee and then instead of setting in motion the procedure outlined therein seek on their own to obtain the resignation of that employee.

This question should be reviewed in that to allow federal officials to seek resignations of their subordinates, even though serving in a "probationary status", rather than following the mandatory procedures set forth by law renders those procedures a nullity and deprives the employee of the protections designed therein. If such procedure were permitted it would be standard operating procedure for federal officials in order to avoid the delay and effort involved in termination proceedings, to seek resignations first.

As stated above Respondents as federal officials were charged with knowledge of applicable law. Chagnon v. Bell, 642 F.2d 1248 (D.C.Cir. 1980)

Again,this is an important issue of federal law never before addressed by this Court.

4. The District Court in its memorandum opinion found that:

> There is nothing in the record to even suggest that the defendants or either of them, took any action that prevented the plaintiff from access to administrative remedies... (Memorandum Opinion p. 27)

This Memorandum Opinion was adopted and endorsed by the Court of Appeals.

Accordingly, the issue is presented as to whether the failure of Respondents to follow applicable law in obtaining Petitioner's separation from government service in fact, in and of itself, blocked

or interfered with Petitioner's access to administrative remedies.

This issue should be addressed by this Court in that the status of a probationary federal civil service employee is such that he in fact has no administrative remedies where he is forced to resign by virtue of the actions of his superiors.

Had Respondents complied with the requirements of regulation, 5 C.F.R. § 315.804 through 806, Petitioner would have had available to him the limited administrative remedies of those provisions.

In the case at hand these limited appeal rights were denied Petitioner since his termination was obtained by coerced resignation, followed by the abolition of the position which he had occupied some three days later.

Accordingly, the issue of whether or not administrative remedies are available

when a probationary federal civil service employee is forced to resign and indeed whether such administrative remedies exist at all is a crucial one never before addressed by this Court and which should be determined after a granting of this petition.

5. This Court should further address the question of whether a federal civil service probationary employee in the position of petitioner, possesses a property right in his continued employment until the employing agency, and specifically the Respondents in this case, afford him the limited form of procedural due process then and now set forth by the applicable federal regulations.

The Eighth Circuit Court of Appeals in Beeson v. Hudson, 630 F.2d 622 (8th Cir. 1980) at p. 626 seemed to recognize the strength of the procedural protections

afforded even a probationary civil service employee when his agency proposes to terminate him for "conditions arising before appointment,". The Eighth Circuit Court of Appeals in that case went on to observe:

> ...It might be found that even a probationer has a vested property interest in his continued employment, to the extent of his legitimate expectation that he will not be terminated for conditions arising before his appointment absent a finding of something like "cause" therefore in a proceeding under 5 C.F.R. § 315.805...

In Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) this Court stated at p. 2709:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from independent source such as state laws-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Also in point is Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972) wherein it is stated at p. 2699 as follows:

> We have made clear in Roth, ...that "property" interests subject to procedural due process protection are not limited to a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings" ...A person's interests in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Under the applicable regulations set forth above, provision is made for advance written notice stating the reasons, specifically and in detail, for the proposed action; an opportunity for the employee to file a written answer and provision that this written answer be considered by the agency in reaching its decision and finally that the employee receive a notice of the

agency's decision in writing at the earliest practicable date informing the employee of the reasons for the action and of his right to appeal and of the time limit within which the appeal must be submitted.

As stated in O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 2480, 65 L.Ed.2d 506 (1980), where a substantial restriction inhibits governmental removal of a presently enjoyed benefit, a property interest will normally be recognized.

Accordingly, it is apparent that the issue of whether Petitioner possessed a property interest in his continued employment to the extent of legitimate expectation that he would not be terminated for conditions arising before his appointment absent a finding of something like cause therefore in a proceeding under 5 C.F.R. § 315.805 should be determined by the Court.

6. Are Respondents, federal employees, entitled to immunity where they take actions which violate 5 C.F.R. 315.805-806, the applicable regulations with respect to proposals to terminate probationary civil service employees?

Petitioner's petition should be granted in order to examine this question in that it has not been answered by this Court or any of the Circuit Courts of Appeal.

As it has been stated, 5 C.F.R. 315.805-806 sets forth the applicable procedure to be followed where a decision is made to terminate a federal probationary civil service employee for reasons based in whole or in part on conditions arising before his appointment.

As has been stated such reglations and procedures are not optional, they are mandatory. Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152 (1957).

This Court determined in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) that in order to determine the issue of qualified immunity the state of the law at the time the improper conduct is alleged to have occurred should be determined. If the law was clearly established, this Court held that the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Respondents are charged with knowledge of applicable law. Chagnon v. Bell, 642 F.2d 1248 (D.C.Cir. 1980)

It is respectfully submitted that this Court should review this issue.

7. The District Court in this case and the United States Court of Appeals for the Eighth Circuit have departed from the accepted and usual course of judicial proceedings in an additional area which

calls for the exercise of this Court's power of supervision.

The District Court admitted into evidence voluminous Federal Bureau of Investigation reports purporting to contain investigative materials with respect to Petitioner and covering a lengthy period of time both before and after his entry into government service. Petitioner objected to the consideration of these reports as hearsay, but they were admitted.

It is respectfully submitted that such documents considered by the District Court for their content, and which were accepted as accurate by the District Court in its Memorandum Opinion constitutes hearsay which is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Federal Rules of Evidence 801(c). Such

calls for the exercise of this Court's power of supervision.

The District Court admitted into evidence voluminous Federal Bureau of Investigation reports purporting to contain investigative materials with respect to Petitioner and covering a lengthy period of time both before and after his entry into government service. Petitioner objected to the consideration of these reports as hearsay, but they were admitted.

It is respectfully submitted that such documents considered by the District Court for their content, and which were accepted as accurate by the District Court in its Memorandum Opinion constitutes hearsay which is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Federal Rules of Evidence 801(c). Such

hearsay is not admissible. Federal Rules of Evidence 802.

The United States Court of Claims observed in Cooper v. U.S., 639 F.2d 727 (Ct.Cl. 1980) that such reports constitute hearsay within hearsay and "attenuate and highly unreliable evidence... which is... at best triple hearsay."

Additionally, the District Court made a determination that Petitioner while employed by the Veterans Administration visited the director of the V.A. Hospital in Fayetteville, Arkansas as well as the president of the University of Arkansas and made certain statements to these officials with respect to his authority which the District Court found to be improper. The only evidence to this effect was Respondent Wilson's testimony recounting statements made to him by others to which Petitioner objected as hearsay; and Respondent Hudson's

testimony as to the content of a telephone conversation with the director of the hospital. Petitioner again objected on the grounds of hearsay.

Additional examples of hearsay admitted into evidence and considered by the District Court and approved by the United States Court of Appeals for the Eighth Circuit in this case was a newspaper article and Respondent Wilson's recounting of comments made to him by other individuals with respect to Petitioner. These errors in admitting such hearsay is compounded by the conclusion of the District Court in its Memorandum Opinion which was adopted by the United States Court of Appeals for the Eighth Circuit that "...Mr. Beeson submitted his resignation due to the F.B.I. reports of his business conduct and involvement with FHA loan applications indicating criminal charges on the premise that his chances

would be better for future service than if he faced termination through established procedures..." (Memorandum Opinion, p. 19) and that "...if Defendants Johnson, Administrator of the Veterans Administration in Washington; Rhodes, Deputy Administrator; and Wilson, Chief Benefits Director, had wanted to discontinue Plaintiff's services, as Plaintiff contends, they could have done so pursuant to the authority which was their discretion as his employing agency for unsatisfactory performance or conduct during the probationary period" (Memorandum Opinion, p. 10).

Further, the District Court apparently found, solely upon the basis of the aforementioned F.B.I. reports, that Petitioner was in fact involved in an alleged "check fraud" or "check kiting" scheme in 1967; (Memorandum Opinion, p. 13) and that the Plaintiff became involved in

questionable or possible violations of federal law concerning FHA rules in connection with home improvement loans through the FHA." (Memorandum Opinion, p. 14)

It is respectfully submitted that these findings by the District Court, adopted by the United States Court of Appeals for the Eighth Circuit are based solely upon the inadmissible hearsay.

Such a departure from the accepted and usual course of judicial proceedings as so exemplified calls for an exercise of this Court's power of supervision and this petition should be granted.

Respectfully submitted,

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(501) 862-9435

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 83-1996

Travis N. Beeson,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court for
Henry E. Hudson,	*	Western District
etc., et al.,	*	of Arkansas
	*	
Appellees.	*	

Submitted: May 15, 1984

Filed: July 12, 1984

Before HEANEY, BRIGHT and JOHN R. GIBSON, Circuit Judges

PER CURIAM.

Travis N. Beeson appeals from the judgment in favor of the various defendants and appellees who were former officials of the Veterans Administration. This is the

second appeal of Beeson's case and this court in Beeson v. Hudson, 630 F.2d 662 (8th Cir. 1980), remanded the case to the district court[1] to consider specifically whether Beeson voluntarily resigned or was constructively discharged from his position with the Veterans Administration. The district court determined as a matter of law that Beeson had resigned. It therefore concluded that he had no due process or property interest claim and therefore had no right to recover against the appellees. Beeson makes some six arguments to establish that the district court erred and that he is entitled to judgment. We affirm.

---

[1] The Honorable Oren Harris, United States Senior District Judge for the Western District of Arkansas.

This case commenced in 1976 and involved Beeson's employment with the Veterans Administration between August 4, 1969 and its termination on January 30, 1970. He sought compensatory and punitive damages and the earlier appeal was from a summary judgment order with respect to his claim under the fifth amendment. Our earlier decision ruled that the constitutional question should not have been decided before a decision on the question of whether Beeson had voluntarily resigned or was constructively discharged. This answer has now been determined by the district court and, because of its decision that Beeson voluntarily resigned, the district court's conclusion followed that he had no right to recover against the appellees.

On appeal Beeson argues that the district court erred in denying a jury trial of this issue, that it erred in finding that

his resignation was voluntary, and that its finding that appellees did not block or obstruct appellant's access to administrative remedies was in error. He also argues that he possessed a property right in continued employment, that the appellees were not immune, an issue not reached by the district court, and that the district court erred in not entering judgment in favor of Beeson.

We have carefully considered all of the arguments advanced by Beeson. There was no error in denying a jury trial as the issues were decided as a matter of law. We conclude that the order of the district court granting judgment in favor of appellees was properly decided and that no error of law appears in the district court's decision. We affirm on the basis of the reasoning set forth in the district court's Memorandum Opinion. See Eighth Circuit Rule

14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

TRAVIS N. BEESON,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	CASE NO. ED-76-2-C
	]	
HENRY E.HUDSON, Individually and as the former Director, Veterans Administration Regional Office, Little Rock, Arkansas;	]	
RUFUS WILSON, Individually and as former Chief of the Department of Veterans Benefits, Washington, D.C.;	]	
DONALD JOHNSON, Individually and as the former Administrator Veterans Administration, Nationally, Washington, D.C.;	]	
FRED B. RHODES, Individually and as the former Deputy Administrator, Veterans Administration, Central Office, Washington, D.C.,	]	
	]	
Defendants.	]	

JUDGMENT

PURSUANT to the findings of fact and the conclusions of law this day filed in the case, together with the entire record, including pre-trial briefs and post-trial briefs, and the Court being well and sufficiently advised, after evidentiary hearing the Court reached the conclusion that the plaintiff failed to sustain the burden by a preponderance of the evidence and the cause should be dismissed.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the complaint of the plaintiff as to all claims against the defendants be and the same is hereby dismissed.

IT IS SO ORDERED this 30th day of June, 1983.

/s/Oren Harris
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

TRAVIS N. BEESON, Plaintiff,	]	
vs.	]	CASE NO. ED-76-2-C
HENRY E.HUDSON, Individually and as the former Director, Veterans Administration Regional Office, Little Rock, Arkansas; RUFUS WILSON, Individually and as former Chief of the Department of Veterans Benefits, Washington, D.C.; DONALD JOHNSON, Individually and as the former Administrator Veterans Administration, Nationally, Washington, D.C.; FRED B. RHODES, Individually and as the former Deputy Administrator, Veterans Administration, Central Office, Washington, D.C., Defendants.[1]	]	

MEMORANDUM OPINION

This action, filed January 29, 1976, was dismissed by the Court November 2, 1979, on a motion for summary judgment filed on behalf of the defendants. The plaintiff brought this action to redress alleged violation of rights, privileges and immunities granted by the due process clause of the Fifth Amendment to the Constitution of the United States. There was a preliminary hearing conducted by the Court wherein counsel for the parties presented their respective contentions on the motion for summary judgment. There was no evidentiary hearing, and the Court decided the motion on the record.

An appeal was taken to the Eighth Circuit Court of Appeals on the constitutional question wherein this Court concluded that the plaintiff had no property or liberty right in his "career conditional"

employment with the Veterans Administration as Staff Assistant to the Regional Director, Little Rock, Arkansas.[2]

The Court of Appeals, Eighth Circuit, in its opinion filed September 17, 1980, vacated the judgment of the Court and remanded the case for further proceedings. Beeson v. Hudson, 630 F.2d 622. The only question presented to this Court on the defendants' motion for summary judgment was his Fifth Amendment claim alleged in Count I of the complaint.

The Court of Appeals, in its remand, declined to decide the plaintiffs Fifth Amendment claim and held that the District Court "erred in reaching out to decide this constitutional question before its decision was compelled." (Citing cases). The Court further determined that the constitutional issue "should have been reached only if, after decision of two non-constitutional

questions, decision was compelled."

The appellate court, therefore, remanded the case to the District Court for decision on these two questions: (1) the District Court should determine, after receiving further evidence as necessary, "whether Beeson voluntarily resigned or was constructively discharged," and if he was constructively discharged the Court should (2) determine "whether his access to his administrative remedies was blocked or interfered with by defendants in such a way as to permit this suit under the rule of Bishop v. Tice," 622 F.2d 349.

The appellate court also stated that on remand the District Court may reconsider, if necessary, Beeson's "property interest" claim and the issue of defendants' "claimed immunity" from liability in this case.

Pursuant to the remand of the Eighth Circuit Court of Appeals, counsel for the

plaintiff Beeson, with permission of the Court, filed, on January 16, 1981, a first amended complaint. In Count I of the complaint the plaintiff reiterated his Fifth Amendment claim against the defendants and, additionally, alleged that the plaintiff resigned on the 30th day of January, 1970, which was in fact and law "constructive discharge." He realleged "property interest" under the Fifth Amendment which, in fact, was a denial of procedural due process. Further, it is alleged in Count I that the defendants by their actions blocked and interfered with plaintiff's access to administrative remedies.[3]

After the amended complaint of plaintiff was filed the parties engaged in substantial discovery via depositions, interrogatories and controversial questions which led to the filing of a motion by defendants to dismiss plaintiff's first

amended complaint. Briefs were filed in support of the motion and response by the plaintiff.

In order to dispose of numerous questions between the parties, the Court scheduled a preliminary hearing on March 27, 1981. After disposing of pending motions, including denial of defendants' motion to dismiss the amended complaint, the government was directed to file answer to plaintiff's amended complaint within 20 days. Both parties were directed to file Local Rule 21, Pre-Trial Report, within 90 days.

In their answers filed April 21, 1981, the defendants raised numerous questions as to jurisdiction, failure to exhaust administrative remedies, and that the action was barred by the statute of limitations.

The defendants filed, on November 2, 1981, motion for summary judgment pursuant

to Rule 56 of the Federal Rules of Civil Procedure, based on the grounds that the statute of limitation bars the plaintiff's claim of obstruction of administrative remedies and contending that the plaintiff, having resigned voluntarily, had no right to administrative relief. On the motion for summary judgment, counsel for the parties filed lengthy briefs with numerous exhibits, affidavits and declarations.

At a preliminary hearing on the defendants' motion for summary judgment April 15, 1982, the Court announced to the parties that the case would be scheduled for trial in September. Subsequently, the case was regularly set for trial commencing September 22, 1982.

On April 19, 1982, an order was entered by the Court denying the motion for summary judgment by defendants Henry E. Hudson, Rufus Wilson, Donald Johnson and Fred B.

Rhodes. The Court granted the motion for summary judgment as to defendants Mollenhoff, Roudebush and Moore. The Court further ordered that the case be scheduled for trial to the court without the intervention of a jury.

In the meantime the Court required the parties to submit pre-trial briefs and information required under Rule 21 of the Local Rules.

The trial commenced, as scheduled, on September 22, 1982, with the plaintiff present and represented by counsel, and the defendants Hudson, Wilson, Johnson and Rhodes present, represented by counsel. Each of the parties testified at length and presented numerous exhibits in support of their respective contentions.

After the receipt of evidence presented during the trial, the parties rested and the case was taken under advisement pending

receipt of briefs. All briefs have now been received and the case submitted for the Court's determination.

In an effort to carry out the mandate of the Court of Appeals, this Court in consideration of the pleadings filed, substantial testimony, and after careful review of the briefs and authorities presented by counsel, makes the following findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

For a better understanding of the questions as mandated by the Court of Appeals, a brief statement leading to the issues as they developed would provide some light that should be considered in reaching a decision on this somewhat emotional and complicated case.

Unfortunately, it started in a political climate with the presidential

campaign of 1968. The plaintiff Beeson became the self-proclaimed spokesman and active in behalf of President Nixon in Arkansas.

In his testimony and depositions, the plaintiff described a meeting held in Atlanta with Mr. Nixon and a number of his advisors just prior to the election. There, according to Mr. Beeson, Mr. Nixon stated that what was needed in the national government was some new faces and he would see that those of you here (in the meeting) would be considered for special services in his administration.

After the election and Mr. Nixon became president, Mr. Beeson went to Washington and followed through on the Atlanta promise. In his contact at the White House and specifically with Mr. Niles Jackson, counsel to the President, the Attorney General, Honorable John Mitchell, was directed to

find a place for Mr. Beeson in government service. In carrying out the edict, Attorney General Mitchell directed the Administrator of Veterans Affairs to make a place for Beeson in the Regional Office, Little Rock, Arkansas. Pursuant thereto, he was assigned to a position of staff assistant, GS-13. This position did not exist in the Little Rock Regional Office and, therefore, it was specially created for the plaintiff.

The testimony disclosed that it was the Central Veterans Administration Office in Washington that created the plaintiff's position and approved Beeson's application for such employment. It follows, and the Court concludes, that it was the Central Office of the Veterans Administration that controlled his appointment to the specially created position and it was the Director of the Central Office, Rufus Wilson, that

brought about his letter of resignation in consultation with Mr. Johnson Administrator of Veterans Administration, and Mr. Rhodes, Deputy Administrator.

The plaintiff had no prior service with the Veterans Administration and had no prior employment experience in the area of veterans' benefits. The conditions of Mr. Beeson's employment with the Veterans Administration included a one-year probationary period. The rules applicable to a "career conditional" appointment severely limited Beeson's claim of entitled to continued employment.

In its opinion in this case our Eighth Circuit Court of Appeals stated:

> We recognize, of course, that a probationary civil service employee has in general only the weakest of "claims of entitlement" to his continued employment. The fact is that he can be dismissed at a virtually unreviewable discretion of this employing agency for unsatisfactory performance or conduct during the probationary period; it is, in general, only after he has achieved

> permanent status that he can be dismissed only for "such cause as will promote the efficiency of the service," upon proper notice and hearing.

Beeson v. Hudson, supra, at page 626.

With the above statement, the Court considers the record of Mr. Beeson's service during his "career conditional" appointment as a staff assistant to the Regional Director of the Veterans Administration in Little Rock, Arkansas. Defendant Henry Hudson was the manager of the Office at Little Rock at that time. He had no prior warning or information that Mr. Beeson was to be a staff assistant under his supervision. He had no direction as to what Mr. Beeson's assignment would be and neither was he given any job description other than that his job was classified as GS-13, step 1. In that the position of such staff assistant did not exist prior thereto it was Mr. Hudson's responsibility to find a place

for him which would assist the manager in any aspect of the operation of the Office. Beeson's first duty, therefore, involved learning the rules and procedures of the various benefits program administered by the Veterans Administration. His duties included assisting in the administration of loans under the G.I. Bill.

Some time after his appointment became effective August 4, 1969, and as an employee with the Veterans Administration, Mr. Beeson, on his own and without making advance appointments and without following the normal Veterans Administration procedures, made a trip at government expense to the Veterans Administration Hospital and the University of Arkansas at Fayetteville, Arkansas. After he informed Mr. Hudson of his planned visit with the Director of the Veterans Administration Hospital and the President of the

University, he was advised that such a visit could not be approved because he had failed to make arrangements for such visits in advance, as required by Veterans Administration procedures. Ultimately, Mr. Hudson did authorize the trip even though it had been improperly arranged because it was too late to cancel at that time. Mr. Beeson was instructed that in the future such trips would be properly planned according to normal Veterans Administration procedure.

After the plaintiff returned from the trip, Mr. Hudson received complaints about the visit made by Beeson to Fayetteville, which Hudson reported to the field director, who, in turn, reported to the defendant Wilson in Washington. Mr. Beeson had advised the director of the VA Hospital and the President of the University of Arkansas that he was there in the role of "President Nixon's man in the state of Arkansas" and

any problems they had should be taken up with him. Reports of his visit became a matter of serious consideration with not only Mr. Wilson in the Washington Office, but defendant Rhodes evaluated it as "a very serious matter and one that should not have happened." The defendant Rhodes as the Deputy Administrator of the Veterans Administration felt compelled to reprimand the plaintiff directly by telephone because of the political overtone and attempted usurpation of authority.

The Court is of the opinion, and finds, that if defendants Johnson, Admiistrator of the Veterans Administration in Washington; Rhodes, Deputy Administrator; and Wilson, Chief Benefits Director, had wanted to discontinue plaintiff's services, as plaintiff contends, they could have done so pursuant to the authority which was their discretion as his employing agency for

unsatisfactory performance or conduct during the probationary period. Beeson v. Hudson, supra.

The Court will now examine and determine the threshold issues presented by the parties in the case, seriatim.

Preliminarily, however, the Court will first dispose of the issue raised by the defendants in their answers that this action is barred by the statute of limitations. The question was not raised until answers by defendants were filed to the plaintiff's first amended complaint April 21, 1981, some eleven years from the time the plaintiff resigned January 30, 1970. It should also be of interest that this was over five years from the filing of the plaintiff's amended complaint. The plaintiff contends that the defendants waived the defense of statute of limitations.[4] The original complaint of the plaintiff was filed January 29, 1976, just

one day before the statute of limitations would have run on the allegations. The original complaint alleged that the plaintiff had been deprived of his property interest without due process based on the Fifth Amendment to the Constitution. It was alleged that the plaintiff resigned under duress and coercion which was, in fact, a "constructive discharge."

Further, Mr. Beeson alleged in his original complaint that he "first refused to resign" and requested reasons for the demand of his resignation. He further stated that in response to his request defendant Hudson informed him that he, the plaintiff, was supposed to have committed some crime and that the plaintiff's involvement was indefensible, among other things. Then the plaintiff stated in his original complaint that, "having qualified for annual leave, requested same."

Further, the plaintiff's complaint alleged that after his conversation with defendant Hudson he telephoned Niles Jackson, counsel to the President of the United States, Richard M. Nixon, and informed him of the adverse action taken against him.

In his first amended complaint the plaintiff alleged similar allegations as in Count I of the original complaint and in addition thereto alleged that the defendants by their actions interfered with and blocked plaintiff's access to administrative remedies. It was to this allegation to the first amended complaint that the defendants raised the issue of statute of limitations.

Ordinarily the defendants contention would be applicable to a common law claim as provided by Ark. Stat. Ann. § 37-206. This Court must assume, however, that the Eighth Circuit Court of Appeals considered this

additional claim as a part and parcel of the plaintiff's Fifth Amendment claim under due process clause. The appellate court evidently construed the issue of "voluntary resignation" versus "constructive discharge" as including the question of interference with his access to administrative remedies or blocked in some way.

If the circumstances were different this court would conclude that on this additional claim of access to administrative remedies the statute of liitations would have barred the plaintiff's right to pursue this issue of interference. Assuming, however, that this was the interpretation placed on the case by the Court of Appeals, the issue of statute of limitations must fall.

The gravamen of the complaint, which will largely determine the other issues in the case, is on the question of Beeson's

resignation. The plaintiff seriously contends that his resignation was involuntary, under duress, and that his termination was, in fact and law, "constructive discharge." The defendants seriously contend that Mr. Beeson's resignation was voluntary and with the full knowledge of the result of his action after ample time and opportunity to consider and investigate, and was taken for the purpose of avoiding administrative process under Civil Service procedures and the probable result. The defendants contend further that his resignation was with the intention of becoming eligible for reinstatement or employment in government service after the allegations of criminal charges were resolved.

The factual setting in which the case arises may be briefly summarized as follows:

Mr. Beeson was the owner of a business, Glidden Paint Center, in Camden, Arkansas. In relation to his business operation, he became a engaged in the construction business. He had purchased a large number of homes from the federal government. He had engaged in extensive business operations and utilized funds with and between a number of banks in the operation of his paint center in the general area of Arkansas. The numerous banks that he had utilized in his operation were banks with Federal Deposit Insurance Corporation.

In 1967 bank examiners discovered from examination at Citizens Bank, Bearden, Arkansas that Travis N. Beeson purchased $258,900.00 worth of bank money orders during the period of September 13, 1967, to November 15, 1967, by drawing checks on his account at First National Bank of Camden, Arkansas where payment was insufficient to

cover the checks at that time. This brought about close surveillance of Mr. Beeson's account. The record discloses that Mr. Beeson admitted activity regarding purchase of money orders described, but denied any criminal intent. He claimed a net worth of about a quarter million dollars. An investigation was commenced by the Federal Bureau of Investigation of the alleged involvement of the plaintiff in a "check fraud" or "check kiting" scheme wherein the plaintiff would write checks on an account with insufficient funds, purchase money orders with new checks written on the account with insufficient funds, deposit the money orders in the account to cover the first checks and then deposit additional money to cover the checks.

Mr. Beeson was fully aware of the investigation of his activities and the probability of the results in 1967 and 1968.

In fact, he was interviewed by the F.B.I. and gave his analysis of what he had been doing. The testimony and record discloses that he was aware of the investigation underway and that it had ben referred to the United States Attorney's Office in 1968 at the time he later sought employment for government services through the White House. Subsequently the United States Attorney declined to prosecute on the alleged violation, based on judgment that no showing had been made that any of the banks suffered any loss in such transactions. The series of reports by the F.B.I. on the investigation were transmitted to defendant Wilson January 15, 1970. This was the first information Wilson had received on plaintiff's business conduct and alleged activity which caused the F.B.I. to conduct the investigation. The reports to Wilson were in normal course of investigating

Beeson's application for the government job with the Veterans Administration in which he was already employed.

The testimony and record also disclosed that the plaintiff became involved with questionable or possible violations of federal law concerning FHA rules in connection with home improvement loans through the FHA. There was substantial investigation by the F.B.I. during 1969. Mr. Beeson testified that he was concerned about the investigation and requested an interview with the F.B.I. and the United States Attorney. The results of the investigation were included in the record by Defendants' Exhibit 2. Such activities apparently began in mid-1967 and according to the record continued through the period the plaintiff was an employee of the V.A.[5]

In a number of the reports included in defendants' Exhibit 2 there were several

incidents where FHA loans were sought and obtained through Mr. Beeson's participation dated just prior to Mr. Beeson's employment as a staff assistant with the V.A. in Little Rock, Arkansas. A number of these loans were carried over and concluded after Mr. Beeson became employed with the V.A. August 4, 1969. The reports also revealed that by several loan applications filed with FHA by Beeson loans were obtained from FHA during the time of Mr. Beeson's service with V.A. The John B. Shaddock loan obtained by Beeson was dated November 14, 1969, for $3,000.00 for repairs to residence at 929 Lucas Street, Camden, Arkansas. A loan was obtained in the name of Walter Fletcher dated November 18, 1969. The Spaulding loan started June 3, 1969. There was the incident with reference to Donald H. Paxton, September, 1969, and the incident of Glenn Dickinson which started in September, 1968,

and continued through Wednesday, October 22, 1969, when the brother of Travis Beeson went to Dickinson's home in connection with the loan nd at the same time inquired about the F.B.I. investigation. The Court concludes that the record is abundantly clear both from these reports and statements of witnesses that the activity continued until the plaintiff Beeson filed for bankruptcy in the early part of November, 1969, and at which time he was in the employ of the Veterans Administration. Mr. Beeson was interviewed by the F.B.I. and, therefore, informed of the investigation and probable charges.

These reports were made available to the defendants in early January, 1970. Mr. Wilson analyzed the reports and subsequently advised Mr. Johnson and Mr. Rhodes. The reports revealed that Mr. Beeson would likely be indicted.[6] A decision was

reached by Mr. Johnson, Mr. Rhodes and Mr. Wilson that Mr. Beeson should be terminated before his "career conditional" appointment had run. Mr. Wilson was directed to call Mr. Hudson and instruct him to call the plaintiff and inform him of the decision and to give him, Mr. Beeson, the option of resigning or facing termination proceedings under the Administrative Procedures Act. Mr. Hudson was not fully advised of all that went on and, therefore, could not give Mr. Beeson the full information that his supervisors had in the Washington office. Mr. Beeson, on being advised of the possible criminal charges, declined to resign and decided to take annual leave. Mr. Hudson informed Mr. Wilson of Mr. Beeson's response. Mr. Wilson, carrying out his responsibility, called Mr. Beeson later in the day and substantiated the information given to Beeson by Hudson. He mentioned to

Mr. Beeson that he, Beeson, was fully aware of the facts in that he had been interviewed by the F.B.I. on both investigations. Mr. Beeson asked that he be permitted to give his response the following day.

Although the plaintiff initially decided to take annual leave in lieu of resigning, he immediately explored the problem with a view of deciding whether he would resign or face termination proceedings available to him as part of the Civil Service System as formulated and adopted by Congress.

Beeson first went to consult his wife, who was a school teacher in one of the North Little Rock schools. They conversed for a period of time, after which Mr. Beeson went to their home. In that Mr. Beeson decided to take annual leave, Mr. Hudson reported to Mr. Wilson in the Washington office. At approximately 4:00 p.m. that afternoon Mr.

Wilson telephoned Mr. Beeson and discussed the problem with him. He advised Beeson that he, Mr. Johnson, and Mr. Rhodes had received the voluminous F.B.I. reports on both the questionable "check kiting" business and the alleged false applications with the Farmers Home Administration to obtain numerous loans. Mr. Wilson stated candidly to Mr. Beeson that he had learned that Mr. Beeson would be indicted. This caused Mr. Beeson to advise Wilson that he would advise him, Wilson of his decision the next day.

After the plaintiff's telephone conversation with Wilson, he called Mr. Niles Jackson at the White House to advise him of the dilemma and seek advice and guidance. Mr. Jackson advised Beeson that he would look into it and be back in touch with him as soon as he could find out about the involvement. Mr. Jackson investigated

the predicament of Mr. Beeson and called him about what he had learned. The crux of the problem was that he had learned, apparently through the Department of Justice, that Beeson would be indicted in connection with loan applications through the FHA. Mr. Jackson advised Beeson that it would be best for him to resign "so that he could be eligible for reinstatement and back pay if he were innocent." Therefore, Mr. Beeson had a choice either to resign and take a chance on overcoming the problem by trial or otherwise and be eligible for further government service, or face termination proceedings which, if they were successful, would cause him to be ineligible for further government employment. On the basis of Mr. Jackson's advice to him, the plaintiff decided to resign and on the morning of January 30, 1970, according to his testimony, he submitted a letter of

resignation to Mr. Hudson.

The plaintiff, according to the testimony, did not at that time discuss the possibility of administrative remedies with either of the defendants. Neither did he discuss with or in any manner inform defendants after submitting his resignation that the resignation was involuntary.

It is noteworthy that in a few days after submitting his resignation the plaintiff called a member of the Civil Service Commission in Washington and discussed the circumstances surrounding his resignation. Mr. Beeson testified that the Commissioner informed him that in view of the fact that he resigned his only recourse would be federal court. This was instructive in that the plaintiff did not contest the action by filing an administrative appeal on the basis that his resignation was involuntary.

In briefs on the part of the plaintiff it is contended that the plaintiff insisted with Mr. Hudson that the resignation be shown as a result of abolishing the position that was created for him initially. It is well established, and the Court finds, that Mr. Beeson submitted his resignation due to the F.B.I. reports of his business conduct and involvement with F.H.A. loan applications indicating criminal charges on the premise that his chances would be better for future service than if he faced termination through established procedures. The record discloses, and the Court finds, that he took this position knowing full well of his activity in the past few years which led not only to criminal proceedings but to proceedings while in the employ of Veterans Administration as a "career conditional" employee.

Furthermore, the plaintiff did not at

any time contend that his resignation had been coerced by the defendants until six years later when he filed his complaint January 26, 1976.

After due consideration of the mandate of the Court of Appeals and evidentiary hearing wherein all the parties testified in the case and filed substantial briefs with the Court, the Court is constrained to hold that as a matter of law based on the record, plaintiff's resignation was voluntary. For the reasons included herein, it is clear to this Court that the plaintiff's allegations of involuntary resignation fail as a matter of law based upon the facts presented in the case.

In a case where the facts were almost identical, Christie v. United States, 518 F.2d (1975), the rule of law applicable to such case is stated and approved, as follows:

> This court has enunciated a principle, now firmly established, for determining whether a resignation is voluntarily tendered. The element of voluntariness is vitiated only when the resignation is submitted under duress brought on by Government action. Leone v. United States, 204 Ct.Cl. 334, 339 (1974). The tripart test for such duress is: *** (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *** Frauhauf Southwest Garment Co. v. United States, 111 F.Supp. 945, 951, 126 Ct.Cl. 51, 62 (1953).
>
> Employee resignations are presumed to be voluntary. This presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. Plaintiff had the opportunity to rebut this presumption before the CSC. This court, under the doctrine of exhaustion of administrative remedies, must restrict its review to the factual matters presented below. See Haynes v. United States,, F.2d 1380, 1383, 190 Ct.Cl. 9, 12-13 (1969), at page 584.

The above standards were adopted in McGucken v. United States, 407 F.2d 1349, 187 Ct.Cl. 284, cert. denied, 396 U.S. 894, 90 S.Ct. 190, 24 L.Ed.2d 170 (1969);

> ***In McGucken v. United States, 407 F.2d 1349, 187 Ct.Cl. 284, cert denied, 396 U.S. 894, 90 S.Ct. 190, 24 L.Ed.2d 170 (1969), this court dealt extensively with he question of voluntariness as related to the validity of a proffered resignation. Holding that the involuntary nature of a resignation arises from external coercion and duress, basically factual issues, the court announced its standard of voluntariness as being the absence of duress.

It then defined its standard as quoted above in Christie v. United States, supra.

In Christie v. United States, supra, the court stated that the plaintiff there failed to show the resignation was obtained by external coercion or duress. The court opined "duress is not measured by the employee's subjective evaluation of the situation. Rather, the test is an objective one." (Citing Cases.)

The plaintiff in Christie, as the plaintiff in the instant case, chose to resign and accept termination rather than challenge the validity of proposed discharge

for cause. The fact remains, the Court stated further, the "plaintiff had a choice. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation." Federal Personnel Manuel Supp. 752-1, subchapter S1-2a(3). Christie, supra, at 587-588.

In Christie, supra, at page 588 the court restated the well established rule explicit in Beeson as follows:

> This court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. Pitt v. United States, supra (termination resulting from possible criminal prosecution); Cosby v. United States, 417 F.2d 1345, 189 Ct.Cl. 528 (1969) (termination for gross insubordination); Autera v. United States, 389 F.2d 815, 182 Ct.Cl. 495 (1968) (termination for incompetence). Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. Autera v. United States, supra 389 F.2d at

> 817, 182 Ct.Cl. at 499. But this "good cause" requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated. Leone v. United States, supra 204 Ct.Cl. at 340. Although plaintiff has attempted to impunge the agency's motivation for proceeding with her proposed termination, plaintiff does not deny that the incident which formed the basis of the charge against her had taken place (although she does assert the so-called assault was nothing more than "inadvertent touching"). This admission is fatal to plaintiff's attempt to impeach the agency's decision to terminate her for cause. Whether this charge could have been sustained had plaintiff chosen to appeal her discharge for cause is irrelevant. What is relevant is that the admission of this incident is prima facie evidence that an arguable basis for discharge existed.

There is nothing in this record including the deposition of plaintiff Beeson or his testimony during the trial to suggest that his resignation was obtained as a result of deception or misrepresentation on the part of the defendants. The indelible truth as established by the record is in fact that Mr. Beeson was fully aware of his

problems from the outset even at the time when he sought special favors through the White House to obtain a position of some recognition in federal service. Again, the record discloses that the plaintiff on his own sought and obtained an interview with the F.B.I.[7] This was done, so the plaintiff claims, because during September through November, 1969, friends informed him of their interviews with the F.B.I.

As further indication of his knowledge of the investigation, he testified that he requested during this period of time that the United States Attorney give him an opportunity to go before the Grand Jury if and when his actions of the past and in recent weeks were to be considered by the Grand Jury.

It has been held that voluntary separations are not "adverse actions" and are thus not appealable to the CSC. See 5

C.F.R. § 752-201(b). Christie v. United States, supra at page 588. Since there was no adverse action in this case, a hearing was not required. McGucken v. United States, supra, at 1352, 187 Ct.Cl. at 289. "The underlying rationale is that a government-initiated removal (adverse action) is analogous to a 'taking' of a property interest; an employee-initiated separation is not." Compare Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), with Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The plaintiff also contends that the defendants held out to him the prospect of reinstatement if he were eventually cleared of any wrongdoing with respect to the subject matter of the F.B.I. investigation. Notwithstanding the claims, there is nothing in this record that the defendants or either

of them suggested that he could return to his position with the Veterans Administration.[8] Mr. Wilson, who had the prime responsibility of administrative action, admitted that he stated to Mr. Beeson in their telephone conversation that, "If you are as innocent as you think you are, you would be eligible for reinstatement with the federal government." The plaintiff, however, insists that with his resignation it was shown that it was due to the abolishment of the position; Beeson demanded that it be included. In fact, very soon after his resignation the position was abolished due to budgetary reasons. The record is clear, however, that abolishing the position was not used as a means of securing the plaintiff's separation from the Veterans Administration employment.

The record does establish, and the Court concludes, that the plaintiff did rely

on the advice of the Civil Service Commissioner and never attempted to file an administrative appeal contesting his resignation as involuntary, and the advice of his friend and acquaintance, Mr. Niles Jackson, counsel to the President, who investigated the matter and called Beeson advising him to resign "so that he would be eligible for reinstatement and back pay if he were innocent." Mr. Beeson testified to this fact and the Court concludes that he relied upon it in arriving at his decision to resign. Furthermore, there is nothing in the record to establish that after the plaintiff was acquitted by a jury in September, 1972, Mr. Beeson returned to his friend Jackson in the White House seeking reinstatement, back pay, or benefits. The Court is convinced that the credibility of the testimony of the four defendants establishes the fact that they did not at

any time hold out to the plaintiff the prospect of reinstatement with the V.A.

In reaching its decision that the plaintiff's resignation was voluntary and not coerced, the Court is guided by the case of Pitt v. United States, 420 F.2d 1028 (1970). There, the plaintiff was faced with court-martial proceedings as a civilian army employee. On the event of the court-martial the plaintiff, on advice of his counsel, resigned his position as an army service employee. Approximately four years later, after he had overcome the problems of the court-martial, he sought reinstatement and back pay on the basis that his resignation was involuntary. The Court of Claims, in adopting the Commissioner's findings of fact, opinion and recommendations, held that the plaintiff was not entitled to recover and petition was dismissed.

This court, in reaching its decision,

is guided by the standard of voluntariness as being the absence of duress, enunciated in McGucken v. United States, supra. Relying on the standard, the appellate court stated:

> If the above factors are considered in isolation, the case for involuntariness seems appealing. That initial impression is tempered, however, when those factors are examined in depth and in the context of the total situation that prevailed at the time.
>
> The first of the requirements for involuntariness specified by McGucken, supra, is that in submitting the resignation in dispute the employee was involuntarily acceding to terms laid down by his employer. Plaintiff's resignation does not fit that mold. (Emphasis added.)
>
> By no reasonable hypothesis can it be inferred that the court-martial proceeding was brought for the purpose of inducing plaintiff to resign.

Pitt v. United States, supra at page 1033.

Likewise, in Beeson, the plaintiff's resignation does not fit the mold of the McGucken standard. By no reasonable hypotheses can it be inferred that the

investigation by the F.B.I. on the plaintiff's activities in connection with the "check kiting" allegation or the investigation of his actions in obtaining loans through FHA was brought for the purpose of enducing Beeson to resign.

The second impairment of McGucken standard for the involuntariness of a resignation is that the attending circumstances offered the employee no reasonable alternative to resigning. In Beeson's case he had an alternative by contesting termination proceedings in lieu of resignation. He chose to resign and his decision was reached after consultation with his friend Jackson at the White House. Therefore, it is clear that the second requirement of McGucken is met.

The third requirement is met in that the Court has already concluded that the circumstances were not the result of

coercive acts of defendants. Frauhauf Southwest Garment Co. v. United States, 111 F.Supp. 945, 951.

Having reached the firm decision that the plaintiff's resignation was voluntary, with the knowledge of all of the circumstances throughout the period of time which motivated his actions, the Court turns to the second crucial issue mandated by the Court of Appeals as to whether his access to administrative remedies was blocked or interfered with by the defendants in such a way as to permit suit under the rule of Bishop v. Tice, supra.

The Court has already reached the conclusion that Mr. Beeson voluntarily resigned and, therefore, was not constructively discharged. In that he was not constructively discharged it is unnecessary to consider further or reach this question. The appellate court mandated

it be determined only if he was constructively discharged. Beeson, 630 F.2d at page 627.

However, this case is most certainly distinguished from Bishop v. Tice, supra. There is nothing in the record to even suggest that the defendants or either of them took any action that prevented the plaintiff from access to administrative remedies under Civil Service System established by Congress. In fact, as already stated, plaintiff consulted a commissioner of the Civil Service Commission. Obviously the commissioner relied upon his statement that he resigned in lieu of facing termination proceedings under that system. The commissioner correctly advised him that since he had resigned he, in fact could not pursue relief through appeal or proceedings through administrative processes. His only

recourse, advised the commissioner, was federal court. The Eighth Circuit in Bishop stated the rule as follows:

> A federal employee in competitive service is entitled to challenge his dismissal as not justified by sufficient cause. Arnett v. Kennedy, 416 U.S. 134, 140-146, 94 S.Ct. 1633, 1637-40, 40 L.Ed.2d 15 (1974) (citing 5 U.S.C. §§ 7501, 7701; 5 C.F.R. Parts 752, 771, 772). ***Although these rights are not available to one who has voluntarily relinquished his employment (because the rights are triggered only by an adverse agency action), see, e.g., Cunningham v. United States, 423 F.2d 1379, 1382 191 Ct.Cl. 471 (1970), the rights are available to one who, like Bishop, has made a nonfrivolous allegation that his resignation was coerced. Gratehouse v. United States, supra. 512 F.2d at 1108.

The Court in consideration of the record in this case concludes that the question as to whether a probationary Civil Service employee is entitled under the due process clause of the Fifth Amendment, to all the processes due him under 5 C.F.R. § 312.805 before his termination is irrevelant. The conditions leading to his

termination arose in accordance with the testimony and record in the case before his employment and, as already determined, during his employment from August 4, 1969, until his bankruptcy proceeding in November, 1969. His voluntary resignation as determined by the Court disposes of any right to due process whether the conditions arose before his employment or during employment.

Although the Court concludes that it is unnecessary to reconsider Beeson's property interest claim, it follows that in view of this Court's decision that plaintiff's resignation was involuntary such claim is not available. See Board of Regents v. Roth, 408 U.S. 564.

The Court is also of the opinion that it is unnecessary to reach the issue of the defendants' claimed immunity from liability in the case. As pointed out by the Eighth

Circuit Court of Appeals in the remand, referring to Wood v. Strickland, 420 U.S. 308, that the defendants are immune from damages if at the time of the conduct and in light of all the circumstances there existed reasonable grounds for the belief the action was appropriate and they acted in "good faith." Counsel for the parties in this case have cited numerous cases for their respective positions on this issue of qualified immunity. The Court concludes that in light of all the circumstances the defendants had reasonable grounds that their action was in accordance with their responsibility and belief that their action was appropriate. However, the attention of the Court has been called to the recent opinion of the Supreme Court of the United States, decided June 13, 1983, in the case of Bush v. Lucas. The Court concluded in the last paragraph of the opinion:

> Thus, we do not decide whether or not it would be good policy to permit a federal employee to recover damage from a supervisor who has improperly disciplined him for exercising his First Amendment rights. As we did in Standard Oil, we decline 'to create a new substantive legal liability without legislative aid and as at the common law' 332 U.S., at 302, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

Apparently this means that the federal courts have statutory jurisdiction to decide federal questions which confer adequate power to award damages to a victim of constitutional violation without congressional expressed authority establishing such a remedy. Evidently the Supreme Court invites the Congress to provide an alternative remedy. Until it does, the federal courts must make the kind of remedial determinations appropriate for the common law tribunal by paying particular heed, however, to any special factors,

counseling hesitation before authorizing any kind of federal litigation.

The Court has considered in depth the issues as presented in Carlson v. Green, 446 U.S. 14 (1980); Bivens, 403 U.S. 396; and Davis, 442 U.S. 245. Although these cases deal with questions presented in Bishop v. Tice, supra, they are clearly distinguishable fr. - the instant case.

The Court has reached its findings of fact from the pleadings filed in this case, discovery of some magnitude including depositions, briefs submitted by able counsel of the parties, testimony of witnesses, including all of the parties, and the entire somewhat voluminous record, and mindful of the import it manifests to the parties. Also, the Court has arrived at its conclusions of law after in depth review of the vast opinions applicable to the litigious suit and attempted to apply the

law to facts for a just and reasonable decision.

The Court can only conclude that the plaintiff has failed to bear his burden by a preponderance of the evidence as included in this memorandum opinion. The Court is, therefore, constrained to conclude that the complaint of the plaintiff should be dismissed, and a separate order will be entered accordingly.

DATED this 30th day of June, 1983.

/s/Oren Harris
UNITED STATES DISTRICT JUDGE

[1]Clark Mollenhoff, former counsel to President Nixon; Richard L. Roudebush, as attorney, Veterans Administration, Central Office, Washington, D.C.; and Roy R. Moore, as Director, Veterans Administration, Regional Office, Little Rock, Arkansas, were originally named as defendants but were dismissed by the Court in its order dated April 15, 1982.

[2]The complaint contained Counts II and III purporting to state causes of action against the defendants under 42 U.S.C. §§ 1985 and 1986 respectively. The Court dismissed both Counts II and III. The ruling of the Court was not an issue in the appeal, and these issues are no longer in the case.

[3]Counsel for the defendants realleged Count II in conjunction with 42 U.S.C. § 1985, and Count III in conjunction with 42 U.S.C. § 1986. These issues have already been disposed of and so noted in the opinion of the Court of Appeals, Eighth Circuit, at page 625. "Beeson conceded these points to the district court."

[4]Title 28 § 2401 provides, inter alia, (a) "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

[5]In the opinion of the Court of Appeals in Beeson v. Hudson, supra, the court stated in Note 2, page 624: "We reject appellee's

contention that Beeson's termination, if any, was other than for "conditions arising before appointment." This statement is significant on the method of termination procedures required by regulations, 5 C.F.R. § 315.804, termination of probationers for unsatisfactory performance and conduct; § 315.805, termination of probationers for conditions arising before appointment; and § 315.806, appeal rights to the commission.

[6] Mr. Beeson was indicted July, 1972, in connection with the Federal Housing loans and tried September, 1972. He was charged in making false statements on the loan applications to the FHA in violation of 18 U.S.C. § 1010. He was acquitted on all five counts.

[7] Additionally, plaintiff was interviewed by the F.B.I. in relation to the investigation of "check kiting" operation on March 11, 1968. Deft. Ex. 4. He was interviewed by the F.B.I. on FHA loan charges December 18, 1969. Deft. Ex. 2. He withheld information of these investigations from his supervisors in V.A.

[8] Plaintiff, by affidavit and by his testimony, claims defendants made such promise, but no documentation or other support presented. All four defendants testified otherwise. The record supports their testimony.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

28 U.S.C.A. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and 1295 of this title.

28 U.S.C.A. § 1331(a):

The district courts shall have original jurisdiction of all civil actions wherein

the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. (Since amended)

Amendment Seven to the Constitution of the United States of America:

In suits at common law, where the value is controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Amendment Five to the Constitution of the United States of America:

No person shall ...be deprived of life, liberty, or property, without due process of law;...

Article Three of the Constitution of the United States of America:

§2: The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, ...

5 C.F.R. § 315.301:

(a) Except as provided in paragraph (b) of this section, an eligible appointed from a register for other than temporary or term employment becomes a career conditional employee.

5 C.F.R. § 315.302:

An employee appointed as provided in § 315.301 acquires a competitive status automatically on completion of probation.

5 C.F.R. § 315.801:

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1) Was appointed from a register;

(2) Was reinstated under § 315.401, unless during any period of service which affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require him to serve a probationary period;

(3) Was appointed under § 315.601(a) as a former employee of the Canal Zone Merit System, unless he satisfactorily completed a 1-year probationary period under that system;

(4) Was appointed under § 315.603(a)(2) on the basis of his former incumbency of a position brought into the competitive service;

(5) Has had his employment converted under § 315.701 or § 315.703 from another type of employment; or

(6) Was appointed under § 315.605 as a former Peace Corps volunteer or volunteer leader or as a VISTA volunteer.

(b) A person who is:

(a) Transferred under § 315.501; or

(2) Promoted, demoted, or reassigned; before he completed probation is required to complete the probationary period in the new position.

(c) A person who is reinstated from the Reemployment Priority List to a position in the same agency and the same commuting area does not have to serve a new probationary period, but, if separated during probation, is required to complete the probationary period in the new position.

5 C.F.R. § 315.802:

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(a) The probationary period required by § 315.801 is 1 year.

(b) The Commission shall publish in the Federal Personnel Manuel a statement of the conditions under which prior service is counted toward completion of a probationary period.

5 C.F.R. § 315.803:

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

5 C.F.R. § 315.804:

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to

demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

5 C.F.R. § 315.805:

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) "Notice of proposed adverse action." The employee is entitled to an advance written notice stating the reasons,

specifically and in detail, for the proposed action.

(b) "Employee's answer." The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) "Notice of adverse decision." The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission and inform him of the time limit within which the appeal must be sumitted as provided in § 315.806(d)

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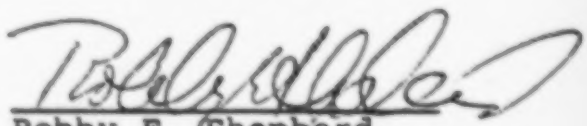
CERTIFICATE OF SERVICE

I, Bobby E. Shepherd, attorney for the Petitioner in the above entitled and numbered cause, do hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari has been served by mailing a copy thereof, postage prepaid, to Respondents' attorney of record, Wendy M. Keats, Civil Division, U.S. Dept. of Justice, Room 3617, 10th & Constitution N.W., Washington, D.C. 20530 on this the 9th day of October, 1984.



Bobby E. Shepherd